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WATER
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NOTICE OF PENDENCY OF ACTION

FEBRUARY 26, 1986
MR. ROBERT L. MORGAN
UTAH STATE ENGINEER
1636 WEST NORTH TEMPLE
SALT LAKE CITY, UTAH 84116

DEAR MR. MORGAN,

PLEASE BE ADVISED THAT ON FEBRUARY 24, 1986, A COMPLAINT WAS FILED IN THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH, CIVIL NUMBER C-86-1341 ENTITLED STANLEY B. BONHAM AND ANNE M. BONHAM, VS. ROBERT L. MORGAN, UTAH STATE ENGINEER, ET,AL.

THIS NOTICE IS SENT TO YOU IN ACCORDANCE WITH SECTION 73-3-14 UCA. 1953.

SINCERELY,

H. DIXON HINDLEY
SALT LAKE COUNTY CLERK

BY *H. Dixon Hindley*
DEPUTY CLERK

HMR/HMR

FEB 14 1984

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[Signature]
 DEPUTY CLERK

50.3319

IN THE DISTRICT COURT FOR SALT LAKE COUNTY.

STATE OF UTAH

STANLEY B. BONHAM and ANNE M.
 BONHAM,

Plaintiffs

vs.

ROBERT L. MORGAN, Utah State
 Engineer, SALT LAKE COUNTY WATER
 CONSERVANCY DISTRICT, a
 Political Subdivision of the
 State of Utah and a Body Cor-
 porate, and DRAPER IRRIGATION
 COMPANY, a Utah Corporation,

Defendants

COMPLAINT

Civil No. *C 861001*

COUNT 1

1. The causes of action set forth in this Count are brought pursuant to the provisions of Sections 73-3-14, 73-3-15 and other provisions of Chapter 3, Title 73 Utah Code Annotated, 1953, as amended, together with other sections of the Utah Statutes.

2. On or about December, 1983, the Defendants Salt Lake County Water Conservancy District, a Political Subdivision of the State of Utah and a Body Corporate, hereinafter District, and Draper

Irrigation Company, a Utah Corporation, hereinafter Draper, filed in the office of the Defendant Utah State Engineer that certain document entitled APPLICATION FOR PERMANENT CHANGE OF POINT OF DIVERSION, PLACE AND NATURE OF USE OF WATER, STATE OF UTAH, hereafter Application. This Application was designated by the Defendant Robert L. Morgan, Utah State Engineer, or by his predecessors in office, as Change Application Number 57-3411 (a13077).

3. The said Application had as attachments thereto, a certain ADDENDUM, consisting of five pages, hereafter Addendum, together with Exhibits "A," "B," "C," "D," and "E."

4. All of the said documents described in the preceding paragraphs in this COUNT 1 are by reference incorporated herein and made a part hereof.

5. The said Application was purportedly filed pursuant to the provisions of §73-3-3 U.C.A., 1953, as amended, and requested the State Engineer to approve and authorize a change in certain allegedly already vested water rights, said changes being to alter and change (1) points of diversion, (2) nature of use of water, and (3) place of use of certain water rights.

6. On or about August 10, 1984, the Plaintiff, Stanley B. Bonham did timely file a protest pursuant to the provisions of §73-3-7 U.C.A., 1953, as amended, and also pursuant to other provisions of the said State Statutes. This document will hereinafter be referred to as Protest and is by reference incorporated herein and made a part hereof.

7. In the said Protest, the Plaintiff Stanley B. Bonham

protested the award of the said Application, requested by the District and Draper on the grounds that the Application interfered with existing property rights belonging to the said Plaintiff, that the said Application would prove detrimental to the public welfare, that the said Application would unreasonably affect public recreation or natural stream environment and would prove detrimental to public welfare; together with other reasons more fully and specifically set forth in said Protest.

8. Thereafter, a hearing was held in the offices of the Defendant Utah State Engineer on February 26, 1985, to consider the merits of the Application and the Protest.

9. At the said hearing, the Protestant Stanley B. Bonham was present together with his counsel James A. McIntosh, and his engineer Jack L. DeMass. During the said hearing, the Plaintiff produced evidence both through himself, his engineer and his counsel to demonstrate that the Plaintiffs' property and the public welfare had been detrimentally, adversely, and negatively affected by the conduct of the Defendants District and Draper in carrying out certain plans and specifications and in the construction of certain facilities as more fully set forth in their Application. The extent of the damage to the Plaintiffs' property and to other public property and the detriment to the public welfare is set out more fully in COUNT 2 and the subsequent Counts hereinafter in this Complaint, which Counts are by reference incorporated herein and made a part hereof.

10. At the said hearing in the State Engineer's office on

February 26, 1985, hereafter Hearing, the Plaintiff further demonstrated that the Defendants District and Draper in their said Application were requesting permission to change the natural flow of water in certain natural tributaries in Salt Lake County, were requesting permission to divert water from one watershed to another, to change open ditches to underground pipelines, to change points of diversion, to build metering stations and overflow structures, and to otherwise change the course, channel, and conveyance of water from the Bell Canyon Reservoir to the District's water treatment plant. The extent to which these changes would be made is more fully set forth in the said Application, Addendum and Exhibits thereto.

11. The Application requested permission to allow the said Defendants to impact upon natural tributaries in Salt Lake County without complying with the Flood Control Ordinances of Salt Lake County, and other provisions of the Utah State Statutes and without obtaining the requisite permit from the Salt Lake County Department of Storm Drainage and Flood Control, from the Salt Lake County Public Works Department, and from other Salt Lake County and State of Utah offices and agencies, and in fact the said Defendants have not complied with the requirements of the said ordinances or statutes, nor obtained the necessary permits as required therein.

12. Following the said Hearing, the Defendant Utah State Engineer, or his representatives made a cursory investigation of the complaints and protests made by the Plaintiffs, but did not undertake any indepth investigation, nor did the said Utah State Engineer

conduct his own independent engineering inspection and investigation of the property in such a way as to determine whether the public welfare would be adversely and negatively affected by the Application submitted by the other Defendants. In this regard, the said Utah State Engineer never did investigate the specific complaints made by Jack L. DeMass as the said hearing, nor did the Defendant engineer attempt to address any of the issues raised by the Plaintiffs at the said Hearing.

13. Section 73-3-8 U.C.A., 1953, as amended in 1985 and also as was in effect during the years 1983 and 1984, specifically provides in Subsection (1) that the State Engineer must reject an Application if it does not meet the requirements of the said Section. The language "shall be rejected" is mandatory. Unless the said Defendant State Engineer finds that all of the conditions set forth in the said Subsection exists, the Engineer does not have the discretion to approve the said Application.

14. Section 73-3-8 U.C.A., 1953, as amended in 1985 provides in part as follows:

If the state engineer, because of information in his possession obtained either by his own investigation or otherwise, has reason to believe that an application to appropriate water will . . . unreasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare, it is his duty to withhold his approval or rejection of the application until he has investigated the matter. If an application

does not meet the requirements of this section, it shall be rejected. [emphasis added]

15. In the instant case, and as more fully set forth in COUNT 2 and the following Counts in this Complaint, the State Engineer was given sufficient information to know that the proposed Application would prove detrimental to the public welfare and in fact had done so substantially and adversely to the extent of tens of thousands of dollars damages in 1983 and 1984, and would also unreasonably affect public recreation or the natural stream environment for the reasons set forth in the following Counts of this Complaint. Under these circumstances, the Plaintiffs submit the Defendant State Engineer had a duty to reject the Application.

16. On or about December 26, 1985, the Defendant ROBERT L. MORGAN, Utah State Engineer issued that certain document entitled MEMORANDUM DECISION in the above-entitled matter, hereinafter Memorandum Decision. In this said Memorandum Decision which consists of just over two pages, the Defendant State Engineer outlined the background of the Application and the Protest and referred to the hearing held on February 26, 1985. With respect to that hearing, the Memorandum Decision states in part as follows:

The Protestant stated that as a result of the project construction, his property was flooded in 1983 and 1984, causing extensive property damage, and that the now-completed project was constructed such that further flooding of his property could occur in the future due to project maintenance, or for other causes at the option of

the District. He further stated the District had not obtained permits allowing them to discharge water from their system, and that the project as constructed was detrimental to the public welfare.

17. Notwithstanding this statement which clearly shows the State Engineer was aware of the evidence introduced at the hearing and the grounds for the protest, the said State Engineer totally omitted to deal with the subjects of either whether the "project as constructed was detrimental to the public welfare" or whether the District had obtained the necessary permits from the Salt Lake County Flood Control Department and other public agencies to entitle them to build the structures and works contemplated by the Application and to allow them to convey water through the said structures and works.

18. Plaintiffs are the owners of real property located at 10741 Dimple Dell Road, which is within the close vicinity of certain changes in diversion points set forth in the said Application, and Plaintiffs have been adversely affected by the structures and works done by the Defendants as more fully set forth in COUNT 2 and the following COUNTS in this Complaint. The Plaintiffs' property has been substantially damaged because of the works installed by the defendants pursuant to their anticipated approval of the said Application, and the Plaintiffs allege they will be damaged repeatedly in the future if this Application is approved.

19. In the said Memorandum Decision, the State Engineer stated in conclusion as follows:

It is, therefore, ordered and Change Application Number 57-3411 (a13077) is hereby APPROVED subject to prior rights.

This decision is subject to the provisions of Section 73-3-14, U.C.A., 1953, which provides for plenary review by the filing of a civil action in the appropriate District Court within sixty days from the date hereof.

DATED this 26th day of December, 1985.

Robert L. Morgan, P.E., State Engineer

20. Section 73-3-14, U.C.A., 1953 as amended provides that in any case where a decision of the State Engineer is involved, any person aggrieved by such decision may, within sixty days after notice thereof, bring a civil hearing in the District Court for plenary review thereof. The Plaintiffs are aggrieved persons, and this COUNT 1 is being brought pursuant to this Section of the State Statutes. The decision of the State Engineer is dated December 26, 1985, and was received by the Plaintiffs on or about January 3, 1986.

21. Section 73-3-15 of the Utah Statutes provides that the hearing in the District Court shall proceed as a trial de novo and shall be tried to the Court as other equitable actions. The Plaintiffs are entitled to have a trial de novo in this Court, where they may have the full opportunity to present all their evidence through witnesses, exhibits, and other testimony to this Court according to the provisions in this section of the Statute.

22. The Plaintiffs allege the decision of the State Engineer

in the Memorandum Decision is erroneous, is contrary to the facts and evidence submitted to the State Engineer at the Hearing on February 26, 1985, and the decision of the State Engineer is contrary to the provisions of Section 73-3-8, and other provisions of the State Statutes.

WHEREFORE, the Plaintiffs demand judgment against the Defendants in this COUNT 1 to have this Court review the decision of the Utah State Engineer with respect to granting approval to this said Application Number 57-3411 (a13077) and to determine that there was no basis to granting said Application, and to enter an Order that the said Application, as it is presently constituted be rejected for failure to satisfy the provisions set forth in Section 73-3-8 of the State Statutes together with other provisions of the said Statutes, and further to award the Plaintiffs their costs of court, together with such other relief as the Court deems appropriate.

COUNT 2

23. The Plaintiffs reallege and incorporate by reference all the allegations in COUNT 1 into this COUNT 2.

24. Prior to 1982, the Defendant Draper was the owner of certain water rights more fully set forth in the said Application described in COUNT 1, said water rights being acquired by Draper from three basic sources, to wit, (1) Decree #3429, dated 1902, in Salt Lake County District Court Case entitled The Dry Creek Reservoir and Irrigation Company et. al. v. the Draper Irrigation

Company, (2) Diligence Claim #47 (57-3411), and (3) Certificate #9215 (57-443).

25. Prior to 1982, the said Draper was conveying the water pursuant to the said water rights from an area approximately at Bell Canyon Reservoir in Salt Lake County, State of Utah, to the Draper water treatment plant, also located in Salt Lake County, State of Utah. The water was being conveyed and diverted by means of dams placed in the channels, headgates, ditches, and flumes connected therewith, as well as other diversion works and appurtenant structures, all of which are hereafter sometimes jointly referred to as Diversion Structures, or simply Structures. In addition to the said Structures, Draper also owned other facilities consisting of open ditches and also underground pipelines, as well as easements and other rights.

26. Since approximately 1968, the Plaintiffs have been the owners of certain real property located at 10701 Dimple Dell Road, in the City of Sandy, County of Salt Lake, State of Utah, which real property consisting of a home, barn and other improvements thereon, was located immediately to the west of and adjacent to the said open ditches and other Diversion Structures described above.

27. Prior to the year 1983, the Plaintiffs had not experienced any water damage to their property because of Draper's conveyance of the said waters in the said Diversion Structures, or other Facilities.

28. On or about May 28, 1982, the Defendants Draper and District entered into an agreement whereby the District was going to

undertake the construction of a raw water collection system, hereafter System, which was to be an integral part of the District's Southeast Regional Water Treatment Plant. The said System contemplated utilizing Draper's open ditch facilities, and otherwise creating additional structures and diversion works which would enable the District to purchase certain of Draper's water rights and to convey water from Bell Canyon Reservoir to the District's Southeast Regional Water Treatment Plant, hereinafter Water Treatment Plant.

29. The May 28, 1982 Agreement described in the next preceding paragraph of this COUNT 2 is by reference incorporated herein and made a part hereof. This document shall hereinafter be referred to as First Agreement.

30. On or about April 6, 1983, the Defendants District and Draper amended the said First Agreement. This Amendment will hereinafter be referred to as Second Agreement, or Amendment. This Second Agreement is also found as Exhibit "B" to the Addendum to the Application described in COUNT 2 above, and is by reference incorporated herein and made a part hereof.

31. The Second Agreement contemplates certain construction work to be done to develop the System and the Water Treatment Plant. The Defendants did undertake to construct the said System either by themselves or by letting out contracts to certain other third party contractors hereafter Contractors.

32. In the said Second Agreement, the District agreed to purchase certain water from Draper and also to construct certain

Diversion Works as more fully described in the said Second Agreement and the Exhibits attached thereto. The construction activities consisted of changing the points of diversion, the nature of use of water, and the place of use. The construction work contemplated taking water from one watershed area into another watershed area, and creating new underground pipelines where there were formerly existing open ditches, and other substantial changes as more fully set forth in said Second Agreement.

33. As owners of the said water rights, the Defendants District and Draper had the obligation to contain all of the water in the said water rights within their own System, and to ensure that the said water would not escape from their Systems and cause damage to any adjoining property owners. The said Defendants further had the duty to adequately design the System so that the points of diversion and other structures would ensure that the water was kept and maintained within the Defendants' facilities, and would not be allowed to escape from the said facilities and flow upon adjoining property. The Defendants had the other duties more fully set forth hereinafter in this COUNT and the following COUNTS of this Complaint.

34. The said Defendants breached these duties, and during the months of approximately April, May, June and July of 1983, and also these same months and other months in 1984, and at other times, did allow the water in their facilities to escape and to be discharged upon on the Plaintiffs' property, all without the Plaintiffs' knowledge, consent, permission or approval, causing substantial

damage to the Plaintiffs' property, the exact amount of which is not known at this time, but which will be known at the time of the trial, and the said amounts will be given to the Defendants as soon as they become known.

35. The breach of the duties described in paragraph 33, constitutes negligence on the part of the said Defendants District and Draper.

36. As the sole, direct and proximate cause of the said negligence of the said Defendants, the Plaintiffs have had their property damaged directly from the discharge of the said water onto their property in the years 1983, 1984, and 1985, in an amount which is not known at this time, but which will be known at the time of the trial, and the said amounts will be given to the Defendants as soon as they become known.

37. The said Defendants constructed as a part of their System, a certain Diversion Structure consisting of a screwgate, concrete spillways, and an underground 36" corrugated steel culvert, hereafter Screwgate Facilities. The said Screwgate Facilities were negligently designed, and were negligently maintained, repaired and operated in 1983, 1984, and 1985 as described above. During these years, the Defendants closed down the Screwgate Facilities, thereby making it impossible for the water in Defendants' facilities to be kept within their own Facilities and to be conveyed in a large underground pipeline from the said Screwgate Facilities to the Water Treatment Plant. As a result of closing down the Screwgate Facilities, all the water in the Defendants' open ditches was diverted

and discharged onto the Plaintiffs' property, causing substantial damage to the Plaintiffs' ground, and also to the Dimple Dell Road public highway in the vicinity of the Plaintiffs' home, and causing other damage to private and public property.

38. The Plaintiffs allege the Application approved by the State Engineer has not made any changes in either the Defendants' System or their Screwgate Facilities, and the Plaintiffs' property will be subject to repeated damage in the future because of the defective design, repair, maintenance and operation of the said System and Screwgate Facilities.

39. This breach of duty of the part of said Defendants also constitutes negligence, and as the sole, direct and proximate cause of the said negligence the Plaintiffs have been damaged in an amount not known at this time, but will be known at the time of the trial, and will be given to the Defendants as soon as it becomes known.

40. The Defendants had the capacity to keep their own water within their own facilities, however, neglected to do so, and during the years 1983 and 1984 did allow water to be discharged from the Bell Canyon Reservoir through Defendants' facilities, even though the Defendants knew or should have known the said discharge would cause damage to the Plaintiffs' property.

41. At the time the water was first discharged on the Plaintiffs' property in 1983, the Plaintiffs tried to stop the Defendants from discharging the water, but were prevented by the Defendants from doing so.

42. After the first discharge of water in 1983, the

Plaintiffs told the Defendants that substantial and severe damages were caused to their property, and requested the Defendants to take whatever action was necessary to prevent a recurrence of the said damage. Notwithstanding this information being given to the Defendants, the Defendants did again in 1984 continue to allow water to escape from their facilities and be discharged down the Plaintiffs' property, causing substantial damage. The said water has been further allowed to escape during the year 1985, and will also be allowed to escape repeatedly in the future unless the Defendants are enjoined from maintaining, repairing, and operating their facilities in the manner they are now doing.

43. The Defendants awarded the contract for the construction of their facilities, and allowed the Contractor to undertake the said construction work during the time of heaviest runoff in the months of April, May, June and July, and at a time when the Defendants knew or should have known of the potential and substantial damage that would be done to the Plaintiffs' property.

44. For the reasons set forth hereinabove, the conduct of the Defendants has been not only negligent, but has been willful and wanton, has been done without any justification in law, and has been done maliciously, for which the Plaintiffs are entitled to punitive damages in the amount of \$25,000.

WHEREFORE, the Plaintiffs demand judgment against the Defendants and each of them jointly and severally on this COUNT 2 as follows:

1. For damages caused to the Plaintiffs' property during

1983, 1984 and 1985 in an amount unknown at this time, but will be known at the time of the trial, and will be given to the Defendants when known.

2. For an injunction enjoining the Defendants from maintaining, repairing, or operating their facilities in a way that will damage the Plaintiffs' property in the future.

3. For \$25,000 punitive damages.

4. For interest on all the above awards at the highest rate allowed by law, both before and after Judgment.

5. Together with costs of court and such other relief as the Court deems appropriate.

COUNT 3

45. The Plaintiffs incorporate by reference all the allegations in COUNTS 1 and 2 into this COUNT 3.

46. As a sole, direct, and proximate cause of the negligence of the said Defendants District and Draper as set forth hereinabove in COUNT 2, and particularly because of the repeated flooding damages which the Plaintiffs are experiencing because of the unlawful discharge of the Defendants' water onto the Plaintiffs' property, the Plaintiffs have in effect had their property taken without due process of law, and have had private property taken for public purposes without the payment of just compensation as set forth in Article 1, Section 22 as well as other provisions of the Utah Constitution, and also as set forth in the Fifth Amendment to the

United States Constitution and the 14th Amendment thereto.

47. As a sole, direct and proximate cause of the said taking of the Plaintiffs' property, the Plaintiffs' property has decreased in fair market value and the Plaintiffs have been damaged in an amount not known at this time, but will be known at the time of the trial, and will be given to the Defendants as soon as it becomes known.

WHEREFORE, the Plaintiffs demand judgment against the Defendants and each of them jointly and severally on this COUNT 3 as follows:

1. For damages caused to the Plaintiffs' property during 1983, 1984 and 1985 in an amount unknown at this time, but will be known at the time of the trial, and will be given to the Defendants when known.
2. For damages to the Plaintiffs' property consisting of a taking of the said property for public use without payment of just compensation in an amount unknown at this time, but will be known at the time of the trial, and will be given to the Defendants when known.
3. For an injunction enjoining the Defendants from maintaining, repairing, or operating their facilities in a way that will damage the Plaintiffs' property in the future.
4. For \$25,000 punitive damages.
5. For interest on all the above awards at the highest rate allowed by law, both before and after Judgment.
6. Together with costs of court and such other relief as the

Court deems appropriate.

COUNT 4

48. The Plaintiffs incorporate by reference all the allegations in COUNTS 1, 2, and 3 above into this COUNT 4.

49. By creating the Diversion Structures, Water Collection System, and other Facilities described in COUNT 2, the Defendants had a duty not to create a nuisance on their property which would interfere with the rights of the Plaintiffs to have the peaceable possession, use and enjoyment of their property without undue interference by the Defendants.

50. The structures and facilities constructed by the Defendants did constitute a nuisance in fact which created an unreasonable interference with the right of the Plaintiffs to occupy and enjoy their property.

51. As a sole, direct and proximate result of the said nuisance, the Plaintiffs have been damaged as set forth in COUNT 2 above.

WHEREFORE, the Plaintiffs demand Judgment against the Defendants and each of them jointly and severally on this COUNT 4 as follows:

1. For damages caused to the Plaintiffs' property during 1983, 1984 and 1985 in an amount unknown at this time, but will be known at the time of the trial, and will be given to the Defendants when known.

2. For damages to the Plaintiffs' property consisting of a taking of the said property for public use without payment of just compensation in an amount unknown at this time, but will be known at the time of the trial, and will be given to the Defendants when known.

3. For an injunction enjoining the Defendants from maintaining, repairing, or operating their facilities in a way that will damage the Plaintiffs' property in the future.

4. For \$25,000 punitive damages.

5. For interest on all the above awards at the highest rate allowed by law, both before and after Judgment.

6. Together with costs of court and such other relief as the Court deems appropriate.

COUNT 5

52. The Plaintiffs incorporate all the allegations in COUNTS 1, 2, 3, and 4 into this COUNT 5 by reference.

53. The Plaintiffs as owners of the private property described in COUNT 2 have the right to be free from any trespass by the said Defendants, and the Defendants have a corresponding duty not to trespass upon the property of the Plaintiffs without their consent and approval.

54. By allowing their waters to escape from their Collection System and Diversion Structures and to be discharged on the Plaintiffs property, without the Plaintiffs' prior knowledge, consent, or

permission, the Defendants District and Draper did trespass upon the said Plaintiffs' property.

55. As a sole, direct and proximate cause of the said trespass, the Plaintiffs have been damaged as set forth in COUNT 2 above.

WHEREFORE, the Plaintiffs demand Judgment against the Defendants and each of them jointly and severally on this COUNT 5 as follows:

1. For damages caused to the Plaintiffs' property during 1983, 1984 and 1985 in an amount unknown at this time, but will be known at the time of the trial, and will be given to the Defendants when known.

2. For damages to the Plaintiffs' property consisting of a taking of the said property for public use without payment of just compensation in an amount unknown at this time, but will be known at the time of the trial, and will be given to the Defendants when known.

3. For an injunction enjoining the Defendants from maintaining, repairing, or operating their facilities in a way that will damage the Plaintiffs' property in the future.

4. For \$25,000 punitive damages.

5. For interest on all the above awards at the highest rate allowed by law, both before and after Judgment.

6. Together with costs of court and such other relief as the

Court deems appropriate.

JAMES A. MCINTOSH & ASSOCIATES P.C.

James A. McIntosh 2/24/86
JAMES A. MCINTOSH
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